No. 684

In the Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

L. A. TUCKER TRUCK LINES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

STATEMENT AS TO JURISDICTION

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

Civil No. 7490(3).

L. A. TUCKER TRUCK LINES, INC., PLAINTIFF,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

STATEMENT AS TO JURISDICTION

(Filed January 28, 1952)

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States of America and the Interstate Commerce Commission, submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the district court entered in this cause on December 7, 1951. A petition for appeal is presented to the district court herewith on January 28, 1952.

OPINION BELOW

The opinion of the District Court for the Eastern District of Missouri, Eastern Division, is reported

in 100 F. Supp. 432, and is attached hereto as Appendix A.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the decision in this cause is conferred by 28 U. S. C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this cause. *United States* v. *Capital Transit Company,* 338 U. S. 286; *United States* v. *Pacific Coast Wholesalers' Association,* 338 U. S. 689; *Alabama Great Southern Railroad Company* v. *United States,* 340 U. S. 216.

QUESTION PRESENTED

Whether a motor carrier can raise for the first time in judicial proceedings to set aside an order of the Interstate Commerce Commission, the issue that the Commission's hearing examiner had not been appointed pursuant to Section 11 of the Administrative Procedure Act, when the carrier had failed to raise such issue before the Commission.

STATUTES INVOLVED

The pertinent provisions of Part II of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 301 *et seq.*, and of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001 *et seq.*, are as follows:

INTERSTATE COMMERCE ACT

Sec. 207. Subject to section 310 of this title, a certificate shall be issued to any qualified ap-

plicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied * * *

ADMINISTRATIVE PROCEDURE ACT

Sec. 5. In every case required by statute to be determined on the record after opportunity for an agency hearing * * *

(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision * * * nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of any investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings * * *

Sec. 7. In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter * * *

Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this chapter, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 1006 and 1007 of this title * * *

STATEMENT

In August, 1948, Pemiscot Motor Freight Company, a motor common carrier, filed an application with the Commission for a certificate of public convenience and necessity under Section 207(a) of the Interstate Commerce Act to extend its operating authority. Tucker Truck Lines, a competing carrier, appeared in the proceedings and opposed the application. Hearings were held in January, 1949, before an examiner who had not been appointed pursuant to Section 11 of the Administrative Procedure Act. The examiner recommended that the certificate be granted, and in January, 1950, Division 5 of the Commission filed its Report that the certificate should issue. Tucker's petition for reconsideration by the full Commission was denied, and its petition for ex-

traordinary relief also was rejected. Pemiscot received its certificate in August 1950.

On September 12, 1950, Tucker commenced the present suit to set aside the Commission's order, alleging that the Commission's findings were without substantial evidentiary support, and that the Commission had acted arbitrarily in granting the certificate to Pemiscot. Up to this point Tucker had made no objection based upon the fact that the examiner had not been appointed pursuant to the Administrative Procedure Act.

On April 16, 1951, this Court handed down its decision in *Riss & Co.* v. *United States,* 341 U. S. 907, holding, contrary to the ruling of the Commission which the district court in that case had affirmed, that the Commission had erred in failing to designate an examiner appointed under Section 11 of the Administrative Procedure Act to conduct hearings in proceedings under Section 207(a) of the Interstate Commerce Act.

When the district court convened to hear the instant case on May 24, 1951, Tucker requested, and obtained, leave to file an amended petition raising the issue that a duly authorized examiner had not presided at the hearings. The court held with respect to this issue that since the proceedings "had not been heard by a proper qualified person under Section 11 of the Administrative Procedure Act," the Commission "did not have jurisdiction" and the proceedings before it were

"invalid." The court accordingly "revoked and cancelled" Pemiscot's certificate, set aside the Commission order granting it, and remanded the matter to the Commission for further proceedings "not inconsistent" with the court's opinion.

THE QUESTION IS SUBSTANTIAL

This appeal presents the substantial question whether the objection that the examiner who presided at an agency hearing had not been appointed under Section 11 of the Administrative Procedure Act may be raised for the first time upon judicial review of the administrative proceedings. That issue was neither presented to nor decided by this Court in *Riss & Co.* v. *United States*, 341 U. S. 907, since in *Riss* the examiner objection had been specifically raised during the Commission proceedings, once during the hearing and again by Riss' petition for reconsideration.[1]

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[1] In the *Riss* case Riss itself had sought a certificate of convenience and necessity to extend its own operations, and discovered on the last day of the hearings that the examiner had not been appointed under the Administrative Procedure Act. Riss formally objected to the conduct of the proceedings on this ground. The objection was disallowed, and Division 5 of the Commission, following the examiner's recommendation, denied the certificate application on the merits. The full Commission denied a petition for reconsideration in which the examiner issue was again raised.

On court review of the Commission order, Riss once more challenged the examiner's capacity. The district court affirmed the Commission order. The court held that inasmuch as Riss admittedly had received a "fair" hearing, the fact that such hearing had not been conducted before an examiner appointed under Section 11 of the Administrative Procedure Act did not invalidate the proceedings. The court held that

In the instant case, however, the protesting carrier remained silent on this issue during the two years that the proceedings were pending before the Commission. In fact, more than 8 months elapsed between the filing of Tucker's petition to review and its initial raising of the issue, shortly after this Court's decision in the *Riss* case.

The decision below thus departs from the well-established rule that courts on review will consider only those issues that have been raised be-

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this section does not apply to proceedings under Section 207(a) of the Interstate Commerce Act because, in the court's view, such proceedings are not required by statute to be determined on the record after opportunity for hearing.

On appeal, the Supreme Court reversed in a *per curiam* opinion, which stated: "The judgment is reversed. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33".

In the *Sung* case the Supreme Court held that deportation proceedings were subject to the hearing requirements of the Administrative Procedure Act. Although the deportation statute did not in terms require a hearing, judicial interpretation had read such a requirement into the statute to sustain its constitutionality. The Court held that the statutory hearing referred to in Section 5 of the Administrative Procedure Act also included hearings "the requirement for which has been read into a statute by this Court to save the statute from invalidity." 339 U.S. 50.

The factual situation in the instant case is markedly different from that in *Riss*. There the Commission's Bureau of Motor Carriers, one of whose employees was the examiner, itself intervened in the proceedings and actively contested Riss' fitness and ability to perform the proposed services. In the instant case, however, the Bureau did not participate in the hearing at all. Its sole connection with the proceedings was the fact that the examiner was one of those employees. Tucker made no contention in the district court that the hearing was "unfair", and it is clear that, apart from the technical point that the examiner had not been appointed pursuant to the Administrative Procedure Act, all the procedural and substantive requirements of a "fair hearing" were met. Cf. *Morgan* v. *United States*, 298 U.S. 468, 304 U.S. 1.

fore the administrative agency—a rule based on the "salutary policy" of affording the agency "opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253, 256; cf. *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U. S. 143, 155.[2] While most of the cases invoking this doctrine have arisen under statutes which specifically provide that the court can consider on review only matters raised before the agency—a limitation not contained in the Urgent Deficiencies Act, under which this action was brought—the settled policy against unduly protracting litigation requires application of the principle to review of Interstate Commerce Commission orders by statutory three-judge district courts. Otherwise a litigant before the Interstate Commerce Commission could fight the case on the merits before the agency, taking a "chance of a favorable decision on the record as made;" if he lost, he could then raise the procedural point de novo before the district court. Cf. *United States* v. *Northern Pacific Railway*, 288 U. S. 490, 494.

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[2] This rule has been applied to bar consideration of even constitutional and jurisdictional objections (*Todd* v. *Securities and Exchange Commission*, 137 F. 2d 475 (C.A. 6)), (constitutional), (*Halsted* v. *Securities and Exchange Commission*, 182 F. 2d 660 (C.A. D.C.)) (company not engaged in or affecting interstate commerce), as well as the contention that the agency failed to make adequate findings (*Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 183 F. 2d 975 (C.A. D.C.)).

In reviewing orders of the Interstate Commerce Commission, the courts consistently have refused to consider objections not presented to the Commission. *Carolina Scenic Coach Lines* v. *United States,* 56 F. Supp. 801, affirmed 323 U. S. 678; *General Transp. Co.* v. *United States,* 65 F. Supp. 981, affirmed, 329 U. S. 668; cf. *Transamerican Freight Lines* v. *United States,* 51 F. Supp. 405, 412, n. 10. In *United States* v. *Hancock Truck Lines,* 324 U. S. 774, this Court held that appellee's waiver of a specific objection on a petition for reconsideration filed with the Commission barred it from raising the issue before the district court. The "reasoning" of the *Hancock* case was cited by the district court in the *General Transp.* case, *supra,* as authority for denying the carrier the right to raise an issue not presented to the Commission, although not specifically waived. In *United States* v. *Capital Transit Co.,* 338 U. S. 286, 291, the Court refused to consider the contention that rates fixed by the Interstate Commerce Commission were confiscatory. The Court held that since "the record fails to show that the issue was properly presented to the Commission for its determination," the question was not "ripe for judicial review." That the applicability of this rule should not depend upon the existence of a specific statutory provision is further shown by the consistent refusal of appellate courts to consider issues not presented to trial courts. *Weade* v. *Dichmann, Wright & Pugh,* 337 U. S. 801.

The fact that the Commission had ruled in the *Riss* case, prior to the administrative hearing in this case, that it considered the Administrative Procedure Act inapplicable to proceedings under Section 207, did not excuse Tucker's failure to raise a similar timely objection. Clearly, it would not under such statutes as the National Labor Relations Act which specifically require parties to first present their objections to the agency, and the same result should follow even where the statute happens to be silent. The related rule of exhaustion of administrative remedies is enforced by the courts even where it is shown that the administrative agency has previously decided the question and is unlikely to change its position. *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 487-488. Exhaustion of administrative remedies has been required even where the administrative agency previously had disclaimed jurisdiction to act. *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207-208; *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 616-617 and cases cited. If the Commission had been informed through timely objections that a large number of the parties to proceedings under Section 207 were contending that the Administrative Procedure Act was applicable, it might well have followed a different course of action, such as complying with that Act out of abundance of caution, or asking Congress for clarifying legislation. Thus, since

the failure of such persons to raise the examiner issue before the Commission has resulted in the type of prejudice which invokes the doctrine of laches, that failure should not be excused.

The decision in the instant case also is in conflict with a subsequent decision by a three-judge district court in another circuit. In *W. J. Dillner Transfer Co.* v. *United States.* F. Supp. (W. D. Pa., Dec. 4, 1951) the court held that a competitor of a certified carrier who had failed to raise the objection that the examiner had not been appointed under the Administrative Procedure Act in a petition for rehearing with the Commission was precluded from raising it on judicial review, since the court "cannot properly consider matters not raised before the Commission when the plaintiff had a sufficient opportunity to do so." The pertinent portions of this opinion are set forth in Appendix B to this Statement. This conflict of decisions between different courts plainly indicates the need for a decision by this Court. The present conflict of decisions leaves the Commission in a serious quandary, particularly in the cases in which it issued certificates. If the certificates were validly issued, the Commission cannot revoke or cancel them except for cause. If they were not validly issued, then the Commission can and must reopen the proceedings.

This problem is particularly serious in this case because of the tremendous impact that the instant

decision may have upon the administration of the Interstate Commerce Act. Between the effective date of the Administrative Procedure Act and the Supreme Court decision in the *Riss* case, the Commission had granted approximately 2500 certificates of public convenience and necessity in proceedings where hearings were conducted by an examiner not appointed under the Administrative Procedure Act.[3] The instant decision casts doubt upon the validity of all of these certificates. Since there is no statute of limitations in proceedings to set aside Interstate Commerce Commission orders, unsuccessful protestants may, for a presumably indefinite period, subject only to the doctrine of laches, judicially challenge their competitors' operating authority. Three more court cases raising the examiner issue already have been filed.[4] In addition, since the decisions in the *Riss* case and the instant case, about 50 petitions for reconsideration have been filed with the Commission seeking rehearing before an examiner appointed pursuant to the Administrative Procedure Act. Moreover, there were many unsuccessful applicants for certificates during this period, who

[3] Interstate Commerce Commission, 65th Annual Report to Congress, pp. 52-53. Since the *Riss* decision, the Commission has assigned Section 207 applications for hearing to duly appointed examiners.

[4] *Pacific Intermountain Express* v. *United States*, Civil No. 30518, N.D. Calif., Southern Division (9th Cir.); *Pomprowitz* v. *United States*, Civil No. 5396, E.D. Wisc., (7th Cir.); *United Transports, Inc.* v. *United States*, Civil No. 1532, W.D. Texas, San Antonio Division (5th Cir.).

might also be able to reopen their cases under the instant decision.

The Commission in its latest annual report to Congress stated that redetermination of the cases originally heard by an examiner not meeting the requirements of the Administrative Procedure Act would be "utterly impossible with our present staff even if we had unlimited funds for this purpose on account of the difficulty of finding a sufficient number of competent employees to handle such a load."[5]

The District Court's conclusion that the Commission "did not have jurisdiction" because of the absence of an examiner appointed under the Administrative Procedure Act, is, we submit without foundation. Clearly, the Commission had jurisdiction over both the subject matter of the proceeding—the grant of a certificate of public convenience and necessity to a motor carrier operating in interstate commerce—and the parties thereto. Characterization of the examiner objection as "jurisdictional" cannot remove it from the

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[5] Interstate Commerce Commission 65th Annual Report, pp. 52-53:

A bill to deal with the problem raised by the *Riss* case has been introduced in Congress. H.R. 5045, 82d Cong., 2d sess., would amend Section 10(e) of the Administrative Procedure Act to provide that no action, findings or conclusions in any proceedings instituted under the Interstate Commerce Act prior to April 17, 1951, shall be set aside solely because an examiner appointed under the Act did not preside, unless objection thereto was made prior to that date or to the close of the hearing.

general rule precluding judicial consideration of objections not presented to the agency.

The decision of the district court in this case would compel the reopening of a large number of these certification proceedings on a procedural objection unrelated to the substantive merits of the application, and the possible invalidation of many certificates in reliance on which substantial investments undoubtedly have been made. Sound judicial and administrative practice dictates against such a result, particularly where the order involved was duly entered by the agency after full dress administrative proceedings admittedly conforming to the agency's procedural rules and unchallenged as to over-all fairness.

We believe that the question presented by this appeal is substantial and that it is of public importance.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

JANUARY 1952.

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

No. 7490 (3)

L. A. TUCKER TRUCK LINES, INCORPORATED, PLAINTIFF

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Before WOODROUGH, Circuit Judge, HULEN and HARPER, District Judges

MEMORANDUM OPINION

(Filed October 18, 1951)

HARPER, Judge:

This is an action by L. A. Tucker Truck Lines, Inc., to annul, set aside and enjoin an order of the Interstate Commerce Commission granting C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, a common carrier by motor vehicle, additional operating authority to engage in interstate commerce over regular routes between specified points in the United States as more fully described in a certificate of public convenience and necessity issued to Pemiscot Motor Freight Company in accordance with the terms of the above described order. The case was heard by a court composed of three judges, pursuant to Section 2284 and 2325, Title 28, USCA.

Orders of the Interstate Commerce Commission are reviewable in this court. *United States* v. *Maher*, 307 U.S. 148. The Functions of the reviewing court are strictly limited. With respect to such limitations the Supreme Court in *Rochester Telephone Company* v. *United States*, 307 U.S. 125, l.c. 140, said: "Only questions affecting constitutional power, statutory authority and basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commissions' orders become incontestable."

The plaintiff (L.A. Tucker Truck Lines, Inc.) on the day of the trial sought leave to file an amended petition, raising in addition to what had been raised in its original petition the further fact that C. I. (Calvin I.) Kephart, the examiner who heard this matter for the Interstate Commerce Commission, had not at the time of the hearing been appointed an examiner pursuant to Section 11 of the Administrative Procedure Act (Public Law 404—79th Congress, Title 5, U.S.C., Sec. 1010). The court reserved ruling on the plaintiff's motion to amend its petition. Proof was introduced to the effect that on January 27, 1949, the date of the hearing in No. MC-105120 (Sub-No. 3), Pemiscot Motor Freight Company, Calvin I. Kephart had not been appointed an examiner pursuant to Section 11 of the Administrative Act.

The Supreme Court in the case of *Riss & Company, Inc.* v. *United States*, 341 U.S. 907, held that Interstate Commerce Commission hearings must be held by examiners appointed to conform with the requirements of the Administrative Procedure Act.

Before considering the merits of the order in question we consider the validity of the order, since Kephart, the hearing examiner, was not qualified as a hearing examiner pursuant to the Administrative Procedure Act. The Supreme Court in the case of *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, l.c. 53, said: "We hold that deportation proceedings must conform to the requirements of the Administrative Procedure Act, if resulting orders are to have validity."

While the Wong Yang Sung case was one dealing with personal rights and this action deals with property rights, yet a distinction should not be drawn between the two as the Administrative Procedure Act applies to both. The Supreme Court in *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Company*, 227 U.S. 88, l.c. 91, said: "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.'"

Judge Hincks, District Judge for Connecticut, in the case of *General Broadcasting System* v. *Bridgeport B. Station*, 53 F. 2d 664, l.c. 668, said: "The field of the superior body being narrow under the express provisions of the act, the matter is one for the application of the rule that acts of an administrative body which do not come clearly within the powers granted to it by the Legislature are void."

The United States Court of Appeals for the District of Columbia in *Heitmeyer* v. *Federal Communications Commission*, 95 F. 2d 91, l.c. 100, said: "Proper administration of the law by governmental agencies such as the Communications Commission requires careful observance of the procedures established by Congress. For the protection of the people generally, to say nothing of the agencies themselves, convenience of administration cannot be permitted to justify noncompliance with the law, or the substitution of fiat for adjudication."

In a matter similar to this action, the California courts *have held in National Automobile & Casualty Ins. Co.* v. *Downey* 220 Pac. 2d 962, l.c. 967, as follows: "Since the agency did not have jurisdiction, in that the proceeding under review had not been heard by a properly qualified person, the result is that the issues had not been determined first or at all by the administrative agency. Therefore, the court properly refrained from determining the sufficiency of the evidence."

Amendments to pleadings are largely discretionary with the courts and the courts have repeatedly held that amendments to pleadings should be allowed with great liberality at any stage of the proceedings unless violative of settled law or prejudicial to rights of opposing parties. The courts have been very liberal in permitting amendments where it is necessary to bring about a furtherance of justice.

The cases referred to above and many not cited would indicate that the order entered by the Interstate Commerce Commission is void and to

deny the right of the L. A. Tucker Truck Lines, Inc., to file its amended petition would only add to confusion. Even if that were not true, we are of the opinion that the amendment should be permitted in the interest of justice. "It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points. So, when a District Court has not made findings in accordance with our controlling rule (Equity Rule 70½) it is our practice to set aside the decree and remand the cause for further proceedings." *Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364, l.c. 373.

In numerous cases causes have been remanded to the Interstate Commerce Commission by the district courts for appropriate action in accordance with the opinion of the court. The right of the plaintiff, L. A. Tucker Truck Lines, Inc., to file its first amendment to its petition is granted, the order of the Commission dated August 7, 1950, is set aside and the cause remanded to the Commission for such action as it may deem appropriate, and in accordance with this opinion.

JOSEPH W. WOODROUGH,
United States Circuit Judge;
RUBEY M. HULEN,
United States District Judge;
ROY W. HARPER,
United States District Judge.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action

No. 8677

W. J. DILLNER TRANSFER CO., PLAINTIFF

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

U. S. A. C. TRANSPORT, INC., INTERVENOR-DEFENDANT

Before STALEY, Circuit Judge, and BURNS and STEWART, District Judges

OPINION AND ORDER

OPINION

STEWART, District Judge.

The plaintiff, W. J. Dillner Transfer Company, brings this action to vacate and set aside two orders of the Interstate Commerce Commission relative to the application of one U.S.A.C. Transport, Inc. for an extension of authority to authorize it to transport airplanes or parts thereof between various points in the United States. The application for extension of authority was filed on May 27, 1948. On April 11, 1949, after a series of hearings conducted in various parts of the United States, F. Roy Linn, one of the examiners for the Interstate Commerce Commission filed a report and recommended an order proposing to grant the application of U.S.A.C. Transport, Inc. Thereafter, on October 19, 1949, the Local Cartage National Conference, Inc. filed a petition for leave

to intervene, reopen, rehear and vacate the recomended order granting certificate to U.S.A.C. Transport, Inc. (hereinafter referred to as "petition for rehearing"). Annexed to this petition was a list of the members of the Heavy Hauling, Machinery Moving & Erecting Section of the Local Cartage National Conference, Inc.; W. J. Dillner Transfer Co., plaintiff here, was listed as such a member and therefore may be treated as having been effectually a party to the petition for rehearing. On December 3, 1949, the Interstate Commerce Commission denied the petition for rehearing and subsequently, on January 18, 1950, granted and issued to U.S.A.C. Transport, Inc. a Certificate of Public Convenience and Necessity. These are the two orders involved in this proceeding.

Subsequently, plaintiff moved for summary judgment, under the theory that only questions of law were involved. Although plaintiff was given opportunity to do so, and although defendants offered a number of exhibits in support of their opposition to the prayers of plaintiff, plaintiff elected to offer no testimony in support of its case. Thus, the hearing on the motion for summary judgment constituted a final hearing of the case.

A motion for summary judgment may be granted only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"; Rule 55(c) Federal Rules of Civil Procedure, 28 U.S.C. following § 723c. *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 130 F. 2d 1016 (3rd Cir. 1942);

U. S. v. *Costa* 11 F.R.D. 492 (W.D. Pa. 1951); *Michel* v. *Meier*, 8 F.R.D. 464 (W.D. Pa. 1948). All doubts are resolved against the moving party. *Sarnoff* v. *Ciaglia*, 165 F 2d 167 (3rd Cir. 1947).

Plaintiff contends that the two orders referred to above should be vacated and set aside as a matter of law on either of two grounds and that none of the fact issues involved are material thereto. First, plaintiff argues that it did not have the formal notice of the hearings on the U.S.A.C. application required by the general order of the Commission issued pursuant to §§ 205(e) and 206(b) of the Interstate Commerce Act, 49 U.S.C. §§ 305(e) and 306(b). Second, plaintiff contends that the orders should be vacated for the reason that the hearings on the application of U.S.A.C. Transport, Inc., were held before a hearing officer of the Commission who was not a hearing officer appointed under the Administrative Procedure Act, 5 U.S.C. §§ 1001 et seq.[6]

Plaintiff's second objection relating to the qualification of the hearing officers remains for disposition. A consideration of the petition for rehearing is important in determining this question. Since this was a petition for rehearing, petitioner was required to comply with the General Rules of Practice of the Commission. Rule 101(b) provides:

> "(b) *Rehearing or further hearing.* When in a petition filed under this rule opportunity is sought to introduce evidence, the evidence

[6] Riss & Co., Inc. v. U. S., 341 U.S. 907 (1951) has set at rest the question as to whether a hearing examiner of the Interstate Commerce Commission must be qualified and appointed under the Administrative Procedure Act.

to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced."

Rule 101(d) provides:

> "(d) *Reconsideration.* If relief under this rule other than under subdivisions (b) and (c) is sought, the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in rule 96(a), as should also any substitute finding or other substitute requirement desired by petitioner."

The petition failed to meet the requirements of these rules, at least with respect to the question of the qualifications of the hearing officers. In fact, it gave no hint of the hearing officer in question. This issue was raised for the first time in this Court. Clear judicial expression supports the doctrine that failure to raise objections so as to permit consideration thereof by the Commission, bars review of such objections when raised for the first time in a judicial proceeding of this type. In *United States* v. *Hancock Truck Lines, Inc.*, 324 U.S. 774 (1945), the Supreme Court of the United States held that it was manifestly improper for a reviewing court to reverse the Commission's order in respect to a provision therein as to which the suitor had expressly waived objection. Relying on this case, the District Court for the District of Massachusetts held, in *General Transportation Co.* v. *United States*, 65 F. Supp. 981 (D. Mass., 1946), affirmed per curiam 329 U.S.

668 (1946) rehearing denied 329 U.S. 827 (1946), that a point not made before the Commission was not properly before the Court for consideration. In reaching this conclusion, the Court stated at page 934:

> "To be sure the plaintiff here, when appearing as protestants before the Commission, did not expressly waive the point they now make, and in this respect the case at bar differs from the Hancock case. Nevertheless the reasoning of that case is applicable, and furthermore, although strictly speaking we are not an appellate court, we in reality are called upon to exercise appellate functions, and from this we think it follows that we should apply general principles applicable on review."

This action is a review, not a *de novo* proceeding, and therefore this Court cannot properly consider matters not raised before the Commission when the plaintiff had a sufficient opportunity to do so.

Although we are not called upon to proceed further, we do note that we have carefully examined the record before the Interstate Commerce Commission to determine whether the order of the Interstate Commerce Commission was void within the meaning of the rule set forth by the Supreme Court of the United States in *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U.S. 88 at 91 (1913); and we are satisfied that substantial justice was done on the basis of the record before the Interstate Commerce Commission.

Therefore, the motion for summary judgment will be denied and the orders objected to will be affirmed.

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